KHEW KEAT SEEN & ORS v. KHEW KOK SENG & ANOR

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[SUIT NO: BA-22NCVC-462-08-2017]
29 MARCH 2024

Abstract – *All parties who entered into a consent judgment are bound by it and are estopped from varying its terms. Therefore, if any of the parties applied for an application that is capable of varying the terms of the consent judgment, such application will be dismissed by the court.*

CIVIL PROCEDURE: *Judgment – Consent judgment – Filing of writ action to enforce and/or apply for consequential order under consent judgment – Consequential order pertained to reliefs sought under re-amended statement of claim for writ action – Whether writ action ought to be struck out – Whether reliefs sought had effect of varying consent judgment – Whether consent judgment still valid and binding – Whether reliefs, if granted, would be nullity – Rules of Court 2012, O. 14A & O. 33*

The first plaintiff and the first defendant were the registered owners of a piece of land ('land'). In respect of the land, in 2015, the plaintiffs and the first defendant entered into a consent judgment where the salient terms therein stipulated that: (i) the land shall be sold to a third party for a sum of not less than RM3 million; (ii) the plaintiffs and the first defendant may seek a potential purchaser for the land within six months from the date of the consent judgment ('sale period'); and (iii) upon the expiry of the sale period, a new selling price for the land shall be agreed by the plaintiffs and the first defendant. However, the plaintiffs subsequently failed to sell the land within the sale period. Due to this, an extension of time for another six months of the sale period was requested by the same. The plaintiffs also proposed to the first defendant to occupy the land and operate the farm situated thereon free of rental until its disposal. The proposal was accepted by the first defendant. Nonetheless, in or about 2016, a company expressed its interest in purchasing the land, but the deal failed to be completed. In 2017, the plaintiffs filed a writ action where they sought, in their re-amended statement of claim, several reliefs. According to the plaintiffs, the writ action was to enforce and/or to apply for consequential orders under the consent judgment. The writ action was resisted by the defendants. As submitted by the defendants, the reliefs sought by the plaintiffs had the effect of varying the consent judgment. For this reason, the defendants, *via* encl. 144, filed an application under O. 14A and/or O. 33 of the Rules of Court 2012 ('ROC') for the court to determine a question of law and/or construction of the consent judgment. The question of law posed was whether the consent

judgment was valid and binding, and if the answer was affirmative, whether the reliefs sought by the plaintiff in the writ action would have the effect of varying the consent judgment and, if so, could the court grant the said reliefs.

Held (dismissing plaintiffs' writ action):

(1) From the reliefs prayed for under the amended statement of claim, it was evident that the plaintiffs were seeking to vary the consent judgment in respect of the manner the land was to be sold and the proceeds of the sale to be distributed. The comparison of the orders under the consent judgment and the reliefs sought in this suit, showed that the said reliefs, if granted, would have the effect of varying the consent judgment. Therefore, considering this and that the consent judgment was still valid and binding, the court does not have the requisite jurisdiction to grant any of the reliefs prayed for by the plaintiffs. If any of the reliefs were granted, it would be a nullity. Thus, the plaintiffs' writ action was struck out with no order as to costs. (paras. 25-26 & 28-29)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Ganapathy Chettier v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum [1981] CLJU 59; [1981] 1 LNS 59 FC ***(refd)***

Lee Heng Moy & Ors v. Pacific Trustees Bhd & Ors [2016] 6 CLJ 368 CA ***(refd)***

Mega Palm Sdn Bhd & Anor v. Hun Tee Siang (Menyaman Atas Kapasitinya Sebagai Pemegang Jawatan Di Persatuan Penduduk Country Heights Damansara, Kuala Lumpur) & Ors [2022] 4 CLJ 248 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 2

Rules of Court 2012, O. 6 r. 2, O. 14A r. 1(2), O. 33

For the plaintiff - HC Tan & Waheeda Md Yusoff; M/s HC Tan & Zahani
For the defendants - RK Sharma & Cheng Su Yin; M/s Cheng Su Yin & Co

Reported by Syamim Ariffin

JUDGMENT
(encl. 144)

Faizah Jamaludin J:

Introduction

[1] This application in encl. 144 was made by the defendants under O. 14A and/or O. 33 of the Rules of Court 2012 ("ROC") for this court to determine a question of law and/or construction of the consent judgment entered by the Shah Alam High Court in June 2015 in Civil Suit No. 22NCVC-171-03/2015 ("the 2015 suit") in respect of the land (defined below).

[2] Essentially, the questions of law posed by the defendants are whether the consent judgment is valid and binding, and if yes, would the reliefs sought by the plaintiffs in this instant suit have the effect of varying the consent judgment, and if so, can this court grant the said reliefs.

[3] For the reasons detailed in this judgment, this court determined that the consent judgment is valid and binding, and the reliefs sought by the plaintiffs would have the effect of varying the consent judgment. Hence, this court does not have the jurisdiction to grant the reliefs prayed for by the plaintiffs in this action. Accordingly, I struck out this action pursuant to the court's powers under O. 14A r. 1(2) of the ROC.

[4] This court's answers to the questions of law in encl. 144 and the full reasons for the answers are set out herein.

Application

[5] The defendants applied for the following questions to be determined by this court:

> (a) sama ada relif-relif yang dituntut oleh Plaintif dalam Writ Saman Terpinda Semula bertarikh 10-2-2023 ("Writ Saman") dan Pernyataan Tuntutan Terpinda Semua bertarikh 10-2-2023 ("Pernyataan Tuntutan") berkenaan dengan Tanah yang dipegang di bawah Hakmilik GM 6009, Lot 809, Mukim Ulu Yam, Daerah Ulu Selangor ("Tanah Tersebut") telahpun diperuntukkan dalam Penghakiman Persetujuan bertarikh 25-6-2015 yang dimasuki antara Plaintif-plaintif dan Defendan Pertama ("Penghakiman Persetujuan");
>
> (b) sekiranya perenggan (a) dijawab secara positif, sama ada relif-relif yang dituntut dalam Writ Saman dan Pernyataan Tuntutan boleh adalah bercanggah dengan terma-terma dalam Penghakiman Persetujuan;
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> (c) sekiranya perenggan (b) dijawab secara positif, sama ada relif-relif yang dituntut dalam Writ Saman dan Pernyataan Tuntutan boleh diberikan oleh Mahkamah yang Mulia ini memandangkan Penghakiman Persetujuan masih sah dan berkuatkuasa;
>
> (d) sekiranya perenggan (c) adalah dijawab secara positif, sama ada relif-relif dalam Writ Saman dan Pernyataan Tuntutan sekiranya dibenarkan Mahkamah yang Mulia ini boleh dikuatkuasakan memandangkan Penghakiman Persetujuan masih sah dan berkuat kuasa.

Material Facts

[6] The material facts are not disputed by the parties.

[7] The first plaintiff ("P1"), Khew Kiat Wee ("the deceased"), and the first defendant ("D1") are the registered owners of a piece of land known as GM6009, Lot 809, Tempat Sungei Liam, Mukim Ulu Yam, Daerah Ulu Selangor, Negeri Selangor ("the land").

[8] The plaintiffs and D1 had entered into a consent judgment dated 25 June 2015 in the 2015's suit to resolve their disputes regarding the land. The relevant terms of the consent judgment are:

> (b) KEDUA, DIPERINTAHKAN BAHAWA tanah yang dipegang di bawah Hak Milik GM 6009, Lot 809, Mukim Ulu Yam, Daerah Ulu, Negeri Selangor (selepas ini disebut sebagai "Tanah Ulu Yam") hendaklah dijualkan kepada pihak ketiga dengan harga tidak kurang daripada RM3,000,000.00 (Ringgit Malaysia Tiga Juta Sahaja) Dan Juga Diperintahkan Plaintif-plaintif atau Defendan dibenarkan mencari seorang pembeli dalam tempoh enam (6) bulan dan selepas enam (6) bulan, harga jualan yang baru hendaklah dipersetujui oleh kesemua Plaintif-plaintif dan Defendan DAN JUGA DIPERINTAHKAN pemilik-pemilik berdaftar iaitu Khew Keat Seen, Khew Kiat Wee dan Khew Kok Seng dikehendaki dikehendaki menandatangani Perjanjian Jual Beli, Borang Pindahmilik (Borang 14A), Borang Melepaskan Gadaian (Borang 16N) (jika ada) dan dokumen-dokumen yang berkenaan dengan pembeli DAN JUGA DIPERINTAHKAN BAHAWA Defendan menyerahkan suratan hakmilik asal Tanah Ulu Yam itu kepada Tetuan Tan Chap & Associates sebagai stakeholder dalam tempoh (14) hari dari tarikh penghakiman persetujuan ini DAN SETERUSNYA DIPERINTAHKAN BAHAWA hasil jualan tanah Ulu Yam hendaklah diagihkan sama rata dalam lima (5) bahagian di antara Plaintif-plaintif dan Defendan selepas menolak wang tebusan (jika ada), fi peguam, cukai tanah dan kos lain-lain.

[9] Pursuant to the consent judgment, the court ordered:

(i) the land shall be sold to a third party for a sum of not less than RM3,000,000;

(ii) the plaintiffs and D1 may seek a potential purchaser for the land within six months from the date of the consent judgment, *ie*, 25 December 2015 ("the sale period"); and

(iii) upon the expiry of the sale period, a new selling price of the land shall be agreed by all the plaintiffs and D1.

[10] The plaintiffs and D1 were unable to sell the land to a third party within the sale period. The plaintiffs then requested that the sale period be extended for another six months, *ie*, on/before 25 June 2016 and proposed to allow D1 "to occupy (the land) and to operate (D1's) farm thereon free of rental until its disposal thereof to a third-party purchaser" D1 accepted the plaintiffs' proposal.

[11] On or about February 2016, a potential purchaser, G-Pile Sistem Sdn Bhd ("G-Pile"), expressed interest in purchasing the land. However, G-Pile did not proceed with the purchase of the land.

[12] The plaintiffs then filed this writ action in August 2017, whereby they sought, in their re-amended statement of claim, the reliefs detailed in the third column of the table in para. [25] below.

The Plaintiffs' Case

[13] The plaintiffs' case is that they filed this fresh suit to enforce and/or to apply for consequential orders under the consent judgment.

[14] Learned counsel for the plaintiffs cite the case of *Mega Palm Sdn Bhd & Anor v. Hun Tee Siang (Menyaman Atas Kapasitinya Sebagai Pemegang Jawatan Di Persatuan Penduduk Country Heights Damansara, Kuala Lumpur) & Ors* [2022] 4 CLJ 248; [2022] 3 AMR 103 ("*Mega Palm*") as authority to support their contention that this court may grant the reliefs, which they had prayed for in this instant suit.

[15] In *Mega Palm*, the Court of Appeal held that a party does not have to file an originating summons under the same action as the consent order to enforce the consent order and/or to seek consequential reliefs to the order. It held that, a party may file a fresh originating summons to seek such reliefs. However, the Court of Appeal in *Mega Palm* did not hold that a party can file a fresh writ action to enforce a consent order or seek consequential reliefs under the order.

The Defendants' Case

[16] The defendants contend that the reliefs sought by the plaintiffs in their re-amended statement of claim have the effect of varying the consent judgment.

Analysis And Findings Of This Court

[17] It is settled law that a consent order is binding on all its parties. The parties to a consent order are estopped from varying the order. In *Ganapathy Chettier v Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum* [1981] CLJU 59; [1981] 1 LNS 59; [1981] 2 MLJ 145 Raja Azlan Shah CJ held:

> ... an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. It may be pleaded as an estoppel: *Kinch v. Walcott* [1929] AC 482 ...

[18] The status of a consent order was explained by the Court of Appeal in *Lee Heng Moy & Ors v. Pacific Trustees Bhd & Ors* [2016] 6 CLJ 368; [2016] AMEJ 0318, [2016] MLJU 1672 as follows:

> ... It is fairly settled and trite law that an order of the court reached by consent of the parties involved is in effect a contract between those parties – see *Ganapathy Chettiar v. Lum Kum Chum & Ors And Another Appeal* [1981] CLJU 59; [1981] 1 LNS 59; [1981] 2 MLJ 145. Such a consent order must therefore be given its full contractual effect – see *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465.
>
> Such an order remains valid, effective and binding on all the parties involved until and unless the order is set aside for some vitiating reason – see the Federal Court's decision in *Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal* [1971] CLJU 143; [1971] 1 LNS 143; [1971] 2 MLJ 75.

A In fact, until that happens, until and unless the consent order is set aside, the consent order operates as an estoppel disallowing the defendants today from departing from its terms.

[19] It is trite that a consent order may only be set aside on grounds that relate to the free consent of the parties to the judgment: see *Badiaddin Mohd* B *Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393; [1998] 1 AMR 909 ("*Badiaddin*"). The Federal Court in *Badiaddin* held that a consent order may be set aside if it is proven that there are grounds that vitiate the parties' free consent, such as fraud, mistake, total failure of consideration, misrepresentation, coercion, undue influence, and C other grounds in equity.

[20] In this instant suit, the plaintiffs did not plead that they had entered into the consent judgment on any of the grounds (held in *Badiaddin*) that would vitiate the plaintiffs' free consent.

D **[21]** Moreover, unlike the respondents in *Mega Palm*, the plaintiffs did not begin this instant suit by filing an originating summons. Instead, they begun this suit by filing a writ action.

[22] What is the difference between an action begun by originating summons and a writ action? Proceedings that are appropriate to be E commenced by way of an originating summons are those where there is no substantial dispute of fact or where the principal question or issue is the construction of any written law or of any instrument made under any written law or of any deed, will, contract or other document. Order 5 r. 4(1) of the ROC states:

F (1) Proceedings:

(a) in which the sole or principal question at issue is or is likely to be one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or any other question of law; or

G (b) in which there is unlikely to be any substantial dispute of fact,

are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 81 or for any other reason considers the proceedings are more appropriate to be begun by writ.

H **[23]** Pursuant to O. 7 r. 2 of the ROC, every originating summons must be begun by Form 5 or Form 6 (for *ex parte* applications). An originating summons does not rely on the use of pleadings or *viva voce* testimonies of witnesses. Evidence is generally by affidavit. Order 7 r. 3 of the ROC states:

I (1) Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed

in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

[24] Whereas a writ action begins with a writ of summons, which is endorsed with a statement of claim: see O. 6 r. 2 of the ROC. It relies on pleadings. Evidence is by way of documents adduced during the trial and *viva voce* testimonies of witnesses – which evidence is governed by the Evidence Act 1950. In contrast, the Evidence Act does not apply to affidavits: see s. 2 of the Act.

[25] From the reliefs prayed for in their amended statement of claim, it is evident that the plaintiffs are seeking to vary the consent judgment in respect of the manner the land is to be sold and the proceeds of sale to be distributed. The comparison (in the table below) of the orders under the consent judgment and the reliefs sought in this suit, shows that the said reliefs, if granted, would have the effect of varying the consent judgment.

22NCVC-171-03/2015 Consent Judgment	BA-22NCVC-462-08/2017 Reliefs Sought by Plaintiffs
(a) The Land to be sold at a price to be agreed by the plaintiffs and D1	The Land to be sold at market value where the selling price and the terms of the sale are to be determined by the Deputy Registrar of this Court.
(b) The plaintiffs and D1 are at liberty to secure a purchaser for the Land.	Only the plaintiffs are entitled to deal with anyone party relating to the sale of the Land, payment and settlement of debt, legal fees, agent's fees. The plaintiffs are entitled to receive any documents and payment relating to the Land.
(c) D1 to execute the Memorandum of Transfer (Form 14A), the discharge of charge (Form 16N) if any and the relevant documents with the purchaser.	D1 to be excluded from executing the Sale and Purchase Agreement, Memorandum of Transfer (Form 14A) and any documents pertaining to the sale of the Land.
(d) D1 to surrender the original title of the Land to Messrs. Tan Chap as stakeholder within 14 days from the date of the Consent Judgment.	Messrs. Tan Chap are to surrender the original title of the Land to the Deputy Registrar or any other parties.
(e) The proceeds of sale of the Land to be redistributed equally amongst the plaintiffs and D1 after deducting the redemption sum (if any), legal fees, quit rent and other costs.	The proceeds of the sale of the Land are to be in the name of the public accounts who shall distribute the proceeds of sale to the plaintiffs and D1.

[26] As the plaintiffs are seeking to vary the way the land is to be sold and the manner in which the proceeds of sale are to be distributed from that ordered under the consent judgment, and as the consent judgment is still valid and binding, this court does not have the requisite jurisdiction to grant any of the reliefs prayed for by the plaintiffs in this instant suit. Any of the reliefs, if granted, would be a nullity.

Answers To Questions of Law

[27] For the reasons above, this court's answers to the questions of law posed in encl. 144 are as follows:

QUESTIONS	ANSWERS
(a) sama ada relif-relif yang dituntut oleh Plaintif dalam Writ Saman Terpinda Semula bertarikh 10-2-2023 ("Writ Saman") dan Pernyataan Tuntutan Terpinda Semua bertarikh 10-2-2023 ("Pernyataan Tuntutan") berkenaan dengan Tanah yang dipegang di bawah Hakmilik GM 6009, Lot 809, Mukim Ulu Yam, Daerah Ulu Selangor ("Tanah Tersebut") telah pun diperuntukkan dalam Penghakiman Persetujuan bertarikh 25-6-2015 yang dimasuki antara Plaintif-plaintif dan Defendan Pertama ("Penghakiman Persetujuan")	Ya
(b) sekiranya perenggan (a) dijawab secara positif, sama ada relif-relif yang dituntut dalam Writ Saman dan Pernyataan Tuntutan boleh adalah bercanggah dengan terma-terma dalam Penghakiman Persetujuan;	Ya
(c) sekiranya perenggan (b) dijawab secara positif, sama ada relif-relif yang dituntut dalam Writ Saman dan Pernyataan Tuntutan boleh diberikan oleh Mahkamah yang Mulia ini memandangkan Penghakiman Persetujuan masih sah dan berkuat kuasa;	Tidak
(d) sekiranya perenggan (c) adalah dijawab secara positif, sama ada relif-relif dalam Writ Saman dan Pernyataan Tuntutan sekiranya dibenarkan Mahkamah yang Mulia ini boleh dikuatkuasakan memandangkan Penghakiman Persetujuan masih sah dan berkuat kuasa.	Tidak

Order

[28] Accordingly, based on this court's determination of the questions of law in this encl. 144, it is hereby ordered that the plaintiffs' writ action against the defendants be struck out.

[29] There is no order as to costs.